SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-1720

JAMES LOUIS JOHNSON,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

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The State of Texas, Respondent in the above styled and numbered cause, submits the following Brief in Opposition to the Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Criminal Appeals of the State of Texas rendered therein on April 18, 1973.

QUESTION PRESENTED

WHETHER PETITIONER'S PLEA OF GUILTY WAS INTELLIGENTLY AND VOLUNTARILY ENTERED IN COMPLIANCE WITH THE STANDARDS PROMULGATED IN *BOYKIN V. ALABAMA*.

REASONS FOR DENYING THE WRIT

Petitioner argues that he has squarely presented the question of whether *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d (1969), is applicable to misdemeanor proceedings. Respondent contends, on the other hand, that the threshold question for this Court is whether Petitioner's plea of guilty, as evidenced by the record, was intelligently and voluntarily entered. If the Court so finds, it need not consider whether *Boykin* applies to misdemeanor proceedings.

The Texas Court of Criminal Appeals, after affirming its belief that *Boykin* has no application to criminal actions classed as misdemeanors, added that "***the docket sheet in the instant case recites that the appellant was admonished." (R-14). Petitioner himself cites the following excerpt from the official transcript of his trial:

> "BE IT REMEMBERED that on the 16th day of June, A.D. 1970, the above entitled and numbered cause came on for trial before the Honorable John J. Orvis, Judge of said Court, and a jury; whereupon, a jury was duly impaneled and sworn; the Defendant arraigned; to which Information the Defendent pleaded "Guilty"; whereupon the Court admonished him of the consequences, whereupon the Information was read to the Jury, to which the Defendant still

> persisted in pleading "Guilty" despite the admonishment; whereupon the plea was received by the Court, and the following proceedings were had:" (Petition, at 3)

Two federal appellate courts have refused to read *Boykin* to mandate the application to State court proceedings of the stringent requirements of Rule 11 of the Federal Rules of Criminal Procedure. In *Hansen v. Mathews*, 424 F.2d 1205 (C.A. 7, 1970), cert.den., 397 U.S. 1057, 90 S.Ct. 1404, 25 L.Ed.2d 675 (1970), the Seventh Circuit Court noted that

> "[i]n *Boykin* the Supreme Court held only that there must be evidence in the trial court record showing that a guilty plea was knowingly and intelligently entered. Procedures similar to Fed.R.Crim.P. 11 were not suggested by the Court and are not required by its decision." *Hansen*, supra, at 1208.

Although finding that the petitioner was expressly asked whether the plea was entered with "his full knowledge and consent," and further, that the petitioner was "questioned by the court after he entered his plea," the *Hansen* Court held that the plea of quilty was "not voided by the failure of the court to advise petitioner of the consequences of his plea or to conduct an inquiry into whether the plea was knowingly and intelligently entered." *Id.*, at 1208.

In *United States v. Frontero*, 452 F.2d 406 (C.A. 5, 1971), the Court of Appeals for the Fifth Circuit similarly declined to void a guilty plea under the even stricter standards of Rule 11. The Court acknowledged that the petitioner was not informed that his plea constituted a waiver of his right of confrontation and his privilege against self-incrimination. But the Court was

> "***aware of no precedent, from the Supreme Court or elsewhere, for the proposition that due process requires that a defendant be informed of each and every right which is waived by a guilty plea or that the waiver of these rights is a 'consequence,' within the meaning of Rule 11, of which a defendant must be personally informed before a guilty plea may be accepted." *Id.*, at 415.

If the petitioner's argument were carried to its logical conclusion, the Court reasoned, a trial court might be obliged to advise an accused of a long list of constitutional guarantees which are waived by a plea of guilty. The Court was persuaded that neither Rule 11 nor due process, the basis of *Boykin*, requires this result. *Boykin*, after all had "***involved a silent record, where there was absolutely no showing that the quilty plea was intelligently and voluntarily entered." *Id.*, at 415.

Respondent contends that the record of the case at bar presents a case for voluntariness at least as strong as those upheld in *Hansen* and *Frontero*. The trial transcript recites that "the Court admonished him of the consequences," and that, after the information was read to the jury, "the Defendant still persisted in pleading 'guilty' despite the admonishment." In addition, the Court of Criminal Appeals found that Petitioner had been admonished. Furthermore, Petitioner was represented by counsel throughout the proceedings on his guilty plea, and he has never alleged that such counsel was less than fully competent. On these facts, Respondent submits that this Court should find that Petitioner's plea of guilty was intelligently and voluntarily entered in compliance with the standards promulgated in *Boykin v. Alabama*.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, certify that a copy of the foregoing Brief in Opposition to a Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas was served on the Petitioner's attorney by depositing same in the United States mail, postage prepaid, on this the _____ day of August, 1973, addressed to Mr. Melvyn Carson Bruder, 706 Main Street (Suite 300), Dallas, Texas 75202.

LONNY F. ZWIENER
Assistant Attorney General